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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE MOTIVA GROUP, INC., Plaintiff and Appellant, v. GLOBAL IMPACT GROUP, INC. et al., Defendants and Respondents.	D073466 (Super. Ct. No. 37-2016-00022422-CU-BC-CTL)

APPEAL from an order of the Superior Court of San Diego County, Joel R. Wohlfeil, Judge. Affirmed.

Mitchell S. Wagner; Singleton & Associates and Terry Singleton for Plaintiff and Appellant.

Bona Law, Jarod Bona, and Aaron Gott for Defendants and Respondents.

The Motiva Group, Inc. (Motiva) appeals from an order granting, on reconsideration, a motion to set aside the default judgments previously entered against Global Impact Group, Inc. (Global) and National Small Business Alliance (NSBA) (collectively, Defendants) and vacating the default and default judgments previously

entered against them. (Code Civ. Proc., §§ 473, subd. (b), 1008.)[1] We conclude the trial court did not abuse its discretion and affirm.

BACKGROUND

A. *Complaint*

In July 2016, Motiva filed a first amended complaint for quantum meruit, fraud, breach of contract, and alter ego, alleging that Defendants are "undercapitalized shams" operated by their owners to "avoid personal liability while funneling business receipts to themselves." According to allegations in the complaint, Motiva contracted with Global, agreeing to provide telemarketing services to Global's client, NSBA. Invoices were to be paid by NSBA, but NSBA did not sign the agreement. The agreement contained a provision that Motiva " 'waives and releases any claim' " against Global if Motiva " 'makes any demand directly on [NSBA],' " and Global would " 'incur no finance or late charges.' " Global initially paid for Motiva's services, but eventually accumulated a balance of over $60,000.00. After NSBA paid a small amount ($3,500), Global and NSBA both refused to pay. Motiva alleged Global insisted on the language used in the agreement "to avoid responsibility by [Global] and NSBA for paying for Motiva's services." Specifically, "under the [a]greement as literally construed, neither [Global] nor NSBA is responsible for paying for [Motiva]'s services, thus rendering the consideration to [Motiva] illusory and the [a]greement unenforceable." Motiva sought damages in quantum meruit for the value of its services in the amount of $74,021.49; damages for

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1 All statutory references are to the Code of Civil Procedure.

breach of contract in the amount of $55,900.97; and damages according to proof for its causes of action based on fraud and alter ego. Motiva additionally requested punitive damages on its fraud claim.

Defendants answered the complaint and Motiva pursued discovery. On February 10, 2017, Motiva obtained an order compelling Defendants to "fully and completely" answer certain written discovery requests "without objections" within 20 days and produce responsive documents within 25 days. The order also imposed sanctions of attorney fees totaling $1,500.00. Defendants' counsel withdrew on February 21, leaving them unrepresented. Defendants failed to comply with the trial court's February 10 discovery order.

B. *Motiva's Motion to Strike Defendants' Answers and Enter Defaults*

Motiva filed a motion to strike Defendants' answers and enter defaults for their failure to comply with the discovery order and for their failure to submit designated officers and employees for noticed depositions. On April 28, the trial court held a hearing on Motiva's motion.

Defendants, who were still unrepresented at the time, sought representation from an attorney, Attorney G., who agreed to represent them by special appearance to inform the court Defendants were seeking new counsel of record and to request a continuance.

The trial court did not permit Attorney G. to appear specially on Defendants' behalf after Attorney G. said he would not substitute in as Defendants' counsel.[2]

The court granted Motiva's motion, striking Defendants' answers and entering defaults. The court also imposed an award of attorney and court reporter fees as sanctions, totaling $2,175.00.

On June 16, following a default prove-up hearing, the court entered judgment in Motiva's favor. The judgment was comprised of damages of $68,010.80, interest of $6,447.05, punitive damages of $340,000.00, unpaid sanctions of $3,675.00, and costs of $1,086.00.

C. *Defendants' Set-aside Motion*

On August 4, Defendants, now represented by new counsel, filed a motion to set aside the default arguing they were entitled to discretionary relief under section 473, subdivision (b) due to excusable neglect, mistake, or inadvertence relating to Attorney G.'s attempted special appearance. The motion was accompanied by a declaration from Defendants' president and chief executive officer, who declared that, after prior counsel terminated representation, the corporations were unrepresented, and Attorney G. attempted to make a special appearance on Defendants' behalf for the purpose of opposing the motion and requesting a continuance. Attorney G. did not advise

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2 (See *Streit v. Covington & Crowe* (2000) 82 Cal.App.4th 441, 444 [outside the formal context of contesting personal jurisdiction, special counsel is permitted to appear only on behalf of counsel of record]; see generally *Air Machine Com SRL v. Superior Court* (2010) 186 Cal.App.4th 414, 427 [recognizing that California continues to recognize the distinction between special and general appearances and discussing the distinction in the context of personal jurisdiction].)

Defendants that a special appearance was not permitted; he then attempted to make a special appearance even though he should have known it was not permitted.

Global and NSBA did not include an attorney declaration of fault in support of their motion. They argued the attorney's mistake was so obvious that a declaration should be unnecessary, and they reasonably relied on Attorney G.'s representation that a special appearance would be allowed under the circumstances. In their motion, Defendants stated, "We do not have a sworn statement and do not seek to obtain one from [Attorney G.], the attorney who specially appeared at the hearing regarding the discovery sanctions that led to the defendants' pleadings being struck." In their reply brief, Global and NSBA additionally stated that "the attorney in question is out of state, cannot be found, and has not returned Defendants' phone calls."

Days before the hearing, the trial court published a tentative ruling denying Defendants' set-aside motion. The day before the hearing, Defendants filed a document entitled "[r]esponse to [t]entative [d]ecision" along with a declaration from Attorney G. dated that same day. At the hearing, Motiva objected to the court's consideration of the newly submitted evidence.

Defendants' counsel explained why the declaration was not previously submitted:

> "This declaration unfortunately was not available to us at the time we had filed this motion to set aside. Because obviously with time constraints, we needed to file a motion to set aside. We're not able to get ahold of the previous attorney, [Attorney G.]
>
> "We tried through emails, through phone calls, suggested in our declarations and the pleadings that were submitted to the initial motion to set aside, as well as the reply that we've been trying and

> making efforts to contact this person. This person's back in Louisiana.
>
> "He's not practicing in California anymore. It was very difficult to find him. It was very difficult to get him to return a phone call or an email. We finally did.
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> "It just so happens the timing of this is right before the hearing, unfortunately. But it's not through any fault of anyone's efforts or lack thereof."

The trial court sustained Motiva's objection and declined to consider the new evidence in connection with the motion. The trial court denied the set-aside motion, ruling that Attorney G.'s mistake in attempting to appear specially for the corporation, rather than generally, was inexcusable, and, without an attorney affidavit of fault, that inexcusable conduct was imputed to the clients, such that relief was unavailable under section 473.[3] In an order dated September 1, the court explained that it was denying relief under the mandatory provisions of section 473 (which requires an attorney affidavit of fault), and instead considering Defendants' request for discretionary relief for excusable neglect:

> "This [m]otion was filed within six months of the entry of default, but no attorney affidavit of fault has been submitted. As a result, relief is only available where the default judgment resulted from the 'mistake, inadvertence, surprise, or excusable neglect' of Defendants. [§ 473.] On April 28, 2017, Defendants' [a]nswers were stricken and a default was entered. Defendants' counsel was not permitted to speak at this hearing because counsel appeared 'specially,' not 'generally. . . .' Defendants did not know their counsel would be unable to speak at the hearing because of his 'special appearance.' Defendants contend this constitutes mistake and excusable neglect. The [c]ourt accepts the proposition that the defaults probably would

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[3] (See *Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249, 258 [attorney's neglect is imputed to client].)

> have been avoided had counsel for Defendants ([Attorney G.]) been permitted to speak during the April 28th hearing. In other words, it is reasonable to presume that [Attorney G.] could have persuaded the [c]ourt that terminating sanctions were not appropriate given the likelihood of settlement, and/or counsel's present ability to supply the past-due discovery responses. On the other hand, the conduct of [Attorney G.] (as imputed to Defendants) is not excusable.
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> ". . . . 'Technically, "special appearance" means an appearance for the limited purpose of challenging an assertion of personal jurisdiction over a party. . . . But we employ it here in its less formal but perhaps more common usage to denote an appearance at a hearing by one attorney at the request and in the place of the attorney of record, whether with or without compensation . . . .' *Streit v. Covington & Crowe* (2000) 82 Cal.App.4th 441, 444 (internal citations omitted). In this action, a 'special appearance' by counsel was clearly not permissible because there was no attorney of record to appear in place of. The decision to make a 'special appearance' was made in error. Mistake is not a ground for relief under section 473 [subdivision (b)], when the Court finds that the 'mistake' is simply the result of professional incompetence, general ignorance of the law, or unjustifiable negligence in discovering the law. *Hearn v. Howard* (2009) 177 Cal.App.4th 1193, 1206."

D. *Defendants' Motion for Reconsideration*

Ten days after the trial court denied their motion to set aside the defaults, Global and NSBA filed a motion for reconsideration under section 1008 arguing that Attorney G.'s declaration was newly discovered evidence not previously considered by the court at the time of its prior ruling and not previously available to Defendants. In support of their motion for reconsideration, they included a declaration from Attorney G., which explained:

> "2. I was admitted to practice in California in 2016 and was part of the Cal Western School of Law Access to Law Initiative Program (law practice incubator program).

> "3. I was contacted by Global Impact Group who indicated they were trying to hire an attorney to represent them in this matter.
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> "4. I was told that there was a hearing but they could not go because they were told that a non-lawyer could not appear on behalf of a corporation. They also told [me] that there was a hearing (**the next day**) in this case and they needed someone to let the court know they were in the process of hiring an attorney but needed one or two weeks to secure one.
>
> "5. When I showed up at the hearing, I was not allowed to speak, since I was not the attorney of record, so I could not convey any of this information to the Court.
>
> "6. I didn't realize the court required any documentation or oral representation as to making a general appearance as it was not my intention to represent the corporation but rather to inform the court of Defendants' status and request.
>
> "7. Had I been aware the court needed any declaration or affidavit or oral representation of general appearance, I would have complied.
>
> "8. I believe that Defendants should not be penalized for this inadvertent mistake."

Defendants' counsel submitted a personal declaration explaining that his office had attempted to obtain a declaration from Attorney G. in connection with the motion to set aside, but they had been unsuccessful in reaching the attorney, who now resides out of state and no longer practices law.

Global's chief operating officer, Raymond L., submitted a declaration detailing his efforts to locate Attorney G. beginning in early August 2017.

Raymond's personal attorney submitted a declaration explaining that, beginning in early August, he tried to locate Attorney G. by calling the phone number listed for him on the State Bar of California website and by calling and mailing various firms he had associated with in San Diego. The attorney was unable to make contact with Attorney G.

until either August 29 or 30, when he asked Attorney G. if he would be willing to provide a declaration.

Motiva opposed the motion for reconsideration, raising many of the same arguments now asserted on appeal.

At a hearing on the motion for reconsideration, the trial court indicated it was inclined to grant the motion, but only conditionally, and admonished Defendants: "you are getting a lot of discretion from the Court today. [¶] . . . [¶] I can assure you it hasn't been lost on the Court. [¶] . . . [¶] So I want to emphasize that the Court's order is conditional. [¶] . . . [¶] And if a prompt satisfaction of all of the conditions in the Court's order has not occurred within the time frame indicated, the motion is denied."

On October 20, 2017, the trial court conditionally granted Defendants' reconsideration motion, imposing the following conditions: (1) within 10 days of the hearing, Defendants must serve verified responses, without objections, to form and special interrogatories, requests for admissions, and requests for production of documents, including the production of responsive documents; (2) within 10 days of the hearing, Defendants must tender the $1,500.00 sanctions award pursuant to the court's February 10, 2017 order (compelling discovery responses); (3) within 10 days of the hearing, Defendants must tender the $2,175.00 sanctions award pursuant to the court's April 28, 2017 order (imposing terminating sanctions); and (4) within 30 days of the hearing, the parties must complete the depositions of two officers of Global and NSBA.

On November 3, the parties appeared for a status conference. They agreed the previously filed and then stricken answers should be deemed Defendants' operative

answers. The parties acknowledged that both sanctions awards had been paid and that discovery responses had been served, but Motiva challenged the sufficiency of certain responses. The parties acknowledged there had been some exchange regarding the setting of deposition dates, but dates had not yet been set. The parties set dates for depositions the following week. The court directed Defendants to provide an additional response to one interrogatory and to produce certain documents, and the court set a follow-up status conference for the next month.

At the follow-up status conference, Motiva continued to assert that Defendants had not complied with the conditions for set-aside, arguing that deponents were evasive in their depositions, and further arguing that additional documents should have been produced in response to the deposition subpoenas. The court rejected these arguments, finding that the deponents' appearances at the depositions satisfied the condition imposed for relief. The court directed Defendants to file an additional discovery verification. The court found that all conditions had been satisfied and confirmed its ruling vacating the default judgment.

On December 13, the court entered an order confirming its prior conditional order granting Defendants' motion for reconsideration, and vacating the defaults and default judgment previously entered against Defendants. The court's order states that "Defendants have carried their burden warrant[ing] reconsideration and, for the reasons previously stated, the [c]ourt vacates the [d]efault and [d]efault [j]udgment against Defendants."

E. *Appeal*

Motiva filed a petition for writ of mandate which this court denied on the ground Motiva has an adequate remedy by immediate direct appeal. (See *Powers v. City of Richmond* (1995) 10 Cal.4th 85, 113; *County of Stanislaus v. Johnson* (1996) 43 Cal.App.4th 832, 834.) Motiva timely filed a notice of appeal from the order granting Defendants' motion for reconsideration and granting relief from default.

DISCUSSION

A. *Motion for Reconsideration*

Motiva appears to make two arguments in support of its claim that the trial court erred when it granted Defendants' motion for reconsideration. First, Motiva contends "Defendants did not present 'new' evidence" within the meaning of section 1008, and the "judicial admission doctrine" precludes them from contradicting their prior stated reason for not presenting an attorney declaration. Second, Motiva contends the evidence Defendants presented—i.e., Attorney G.'s declaration—was inadequate because counsel "should have addressed 'the likelihood of settlement' and/or his 'present ability to supply the past-due discovery responses.' " We reject Motiva's arguments and hold that the trial court did not abuse its discretion in granting Defendants' motion for reconsideration.

1. *Applicable Law*

Under section 1008, subdivision (a), a party may seek reconsideration of a prior court order based on "new or different facts, circumstances, or law." (§ 1008, subd. (a).)[4] " 'To merit reconsideration, a party must give a satisfactory reason why it was unable to present its "new" evidence at the original hearing.' " (*McPherson v. City of Manhattan Beach* (2000) 78 Cal.App.4th 1252, 1265 (*McPherson*); accord *Shiffer v. CBS Corp*. (2015) 240 Cal.App.4th 246, 255 (*Shiffer*) ["[T]he moving party must provide a ' " 'satisfactory explanation for the failure to produce that evidence at an earlier time.' " ' "].) "We review a trial court's ruling on a motion for reconsideration under the abuse of discretion standard." (*Yolo County Dept. of Child Services v. Myers* (2016) 248 Cal.App.4th 42, 50.)

2. *Analysis*

We conclude Defendants met their burden to show relief was warranted under section 1008, and the two grounds advanced by Motiva to establish error lack merit.

To support their motion for reconsideration, Defendants were required to present new or different facts or circumstances that were not previously available to them through reasonable diligence. (*McPherson, supra*, 78 Cal.App.4th at p. 1265; *Shiffer, supra*, 240 Cal.App.4th at p. 255.) The trial court did not abuse its discretion in finding that Defendants met their burden under section 1008.

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4 A party seeking reconsideration must do so "within 10 days after service upon the party of written notice of entry of the order . . . ." (§ 1008, subd. (a).) It is undisputed that Defendants' motion for reconsideration was timely under the statute.

Defendants submitted a declaration by Attorney G., who claimed fault for the entry of a default judgment against Defendants. Attorney G. explained Defendants needed someone to appear at a hearing "to let the court know they were in the process of hiring an attorney" and needed additional time; Attorney G. appeared at the hearing but was not able to convey this information to the court; "it was not [Attorney G.'s] intention to represent the corporation but rather to inform the court of Defendants' status and request"; Attorney G. did not realize he needed to make a general versus special appearance; and he "would have complied" if he were aware he needed to make a general appearance on Defendants' behalf. Defendants' counsel submitted a personal declaration explaining that his office had attempted to obtain a declaration from Attorney G. in connection with the motion to set aside, but they had been unsuccessful in reaching the attorney, who now resides out of state and no longer practices law.

When the court ruled on Defendants' motion to set aside the default judgment, the court stated that "no attorney affidavit of fault has been submitted." The court therefore considered whether Defendants were entitled to discretionary relief under section 473—not mandatory relief based on an attorney affidavit of fault. By submitting Attorney G.'s declaration, Defendants provided new evidence that was not previously considered by the trial court. (See *Hollister v. Benzl* (1999) 71 Cal.App.4th 582, 584-585 [motion for reconsideration was properly granted where plaintiff obtained previously-requested documents after the earlier hearing].)

In addition to providing the attorney affidavit of fault that the trial court had previously found was missing, Defendants explained why they failed to present the

document sooner. Defendants submitted multiple declarations explaining they had attempted to locate Attorney G. beginning in early August,[5] but he had moved out of state and stopped practicing law. Defendants' efforts to locate him were unsuccessful until the time of the hearing on the set-aside motion.[6] On this record, the trial court did not abuse its discretion in finding that Defendants met the threshold requirements for a motion for reconsideration.

We are not persuaded by Motiva's arguments that the trial court erred in granting reconsideration. In its first claim of error, Motiva contends that, under the "judicial admission doctrine," Defendants are bound by an earlier explanation they provided for not obtaining an attorney declaration of fault. In their initial set-aside motion, Defendants stated that "[w]e do not have a sworn statement and do not seek to obtain one . . . ." Motiva claims that Defendants are barred from contradicting this "admission," and they therefore cannot establish reasonable diligence under section 1008. We disagree.

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5 Defendants filed their set-aside motion on or around August 4, 2017.

6 For this reason, Motiva's reliance on *Foothills Townhome Assn. v. Christiansen* (1998) 65 Cal.App.4th 688, 692, fn. 6, disapproved on another ground in *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 68, fn. 5, is misplaced. In *Foothills*, the Court of Appeal held that plaintiff's erroneous belief that certain evidence was unnecessary at a summary judgment hearing was insufficient to justify reconsideration. (*Foothills*, at p. 692.) In the present case, however, Defendants were not deliberately withholding evidence that was always available to them or already in their possession. (Cf. *Garcia v. Hejmadi* (1997) 58 Cal.App.4th 674, 690.) The trial court credited Defendants' explanation for not providing an attorney declaration sooner, and we defer to the trial court's factual findings and credibility determinations. (See *Citizens Business Bank v. Gevorgian* (2013) 218 Cal.App.4th 602, 613.)

"Not every document filed by a party constitutes a pleading from which a judicial admission may be extracted." (*Myers v. Trendwest Resorts, Inc.* (2009) 178 Cal.App.4th 735, 746.) Pleadings in a civil action are defined as "complaints, demurrers, answers, and cross-complaints" (§ 422.10), not briefs. (*Myers*, at pp. 746-747.)

Even if we were to assume the statement at issue from Defendants' brief was a judicial admission, trial courts have some discretion to disregard admissions. (*Kurinij v. Hanna & Morton* (1997) 55 Cal.App.4th 853, 871.) And even if Defendants were bound by their prior statements, those statements must be viewed in their proper context. "A judicial admission is a party's unequivocal concession of the truth of a matter, and removes the matter as an issue in the case." (*Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 48.) Here, Defendants did not unequivocally concede in their brief that they failed to exercise reasonable diligence in obtaining Attorney G.'s affidavit of fault. Accordingly, they were not precluded from presenting evidence on this issue.[7]

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[7] In the same initial set-aside motion Motiva relies on, Defendants also stated: "A sworn statement from [Attorney G.] should not be necessary in this instance, as it is obvious that the mistake of making a special appearance would lead to the inability to appear at the hearing on behalf of the Defendants." In their reply brief, Defendants stated, "the attorney in question is out of state, cannot be found, and has not returned Defendants' phone calls." These statements were made in the context of Defendants' inability to provide a declaration of fault (because they had not yet located Attorney G.) and Defendants' attempt to obtain *discretionary* relief for what they described as their own excusable neglect. The trial court did not abuse its discretion in giving Defendants the opportunity to provide additional facts to support their reconsideration motion by explaining their late production of the attorney declaration of fault which was required for *mandatory* relief under section 473. (See *Cal. Bank & Trust v. Piedmont Operating Partnership, LP* (2013) 218 Cal.App.4th 1322, 1349 ["inartful wording" used in the presentation of legal argument does not bind a party as a dispositive factual admission].)

As a second ground for challenging the court's order granting Defendants' motion for reconsideration, Motiva asserts that Attorney G.'s declaration was deficient in failing to address the likelihood of settlement and his present ability to provide past-due discovery responses. Motiva contends this information was necessary because, in its initial September 1 order denying Defendants' set-aside motion, the trial court stated, "it is reasonable to presume that [Attorney G.] could have persuaded the [c]ourt that terminating sanctions were not appropriate given the likelihood of settlement, and/or counsel's present ability to supply the past-due discovery responses." Motiva's reliance on the trial court's prior ruling on Defendants' set-aside request—for purposes of challenging the separate ruling on Defendants' motion for reconsideration—is misguided. As discussed, Defendants were required to meet the statutory requirements of section 1008 by presenting new evidence not previously available by reasonable diligence. The court found that "Defendants have carried their burden," and we agree.

In sum, the trial court did not abuse its discretion in concluding Defendants met their burden to establish "new or different facts, circumstances, or law" to meet the statutory requirements of section 1008.

B. *Motion to Set Aside the Default Judgment*

After determining that reconsideration was warranted, the trial court concluded that Attorney G.'s declaration supported the conclusion that the attorney's mistake caused the entry of Defendants' default. The court conditionally granted relief but required Defendants to provide the court-ordered discovery responses, to appear for previously noticed depositions, and to pay outstanding sanctions. Upon Defendants' compliance

with these conditions, the trial court confirmed its conditional order and granted Defendants relief from default. The trial court did not err in granting Defendants' requested relief.

1. *Applicable Law*

Section 473, subdivision (b), contains provisions for both discretionary and mandatory relief. (*Even Zohar Construction & Remodeling, Inc. v. Bellaire Townhouses, LLC* (2015) 61 Cal.4th 830, 838.) The mandatory relief provision provides in relevant part: "Notwithstanding any other requirements of this section, the court shall, whenever an application for relief is made no more than six months after entry of judgment, is in proper form, and is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, vacate any (1) resulting default entered by the clerk against his or her client, and which will result in entry of a default judgment, or (2) resulting default judgment or dismissal entered against his or her client, unless the court finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect." (§ 473, subd. (b).)

"To obtain mandatory relief under section 473, [the moving party's] counsel need not show that his or her mistake, inadvertence, surprise or neglect was excusable. No reason need be given for the existence of one of these circumstances. Attestation that one of these reasons existed is sufficient to obtain relief, unless the trial court finds that the [default] did not occur because of these reasons." (*Graham v. Beers* (1994) 30 Cal.App.4th 1656, 1660 (*Graham*).) "Relief is mandatory when a complying affidavit is filed, even if the attorney's neglect was inexcusable." (*Rodrigues v. Superior Court*

(2005) 127 Cal.App.4th 1027, 1033 (*Rodrigues*).) The attorney attesting to fault need not be the attorney of record in the civil action. (*SJP Limited Partnership v. City of Los Angeles* (2006) 136 Cal.App.4th 511, 517-518 [finding mandatory relief from default was warranted based on bankruptcy attorney's affidavit of fault, even though bankruptcy attorney did not represent defendant in the civil action].)

"[T]he remedial relief offered by section 473 is 'highly favored and is liberally applied.' " (*Fasuyi v. Permatex, Inc*. (2008) 167 Cal.App.4th 681, 696.) "Because the law favors disposing of cases on their merits, 'any doubts in applying section 473 must be resolved in favor of the party seeking relief from default [citations]. Therefore, a trial court order denying relief is scrutinized more carefully than an order permitting trial on the merits.' " (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 980.)

"The meaning of section 473, subdivision (b) is a question of statutory interpretation we review de novo. [Citation.] Whether section 473, subdivision (b)'s requirements have been satisfied in any given case is a question we review for substantial evidence where the evidence is disputed and de novo where it is undisputed." (*Martin Potts & Associates, Inc. v. Corsair, LLC* (2016) 244 Cal.App.4th 432, 437.)

2. *Analysis*

On appeal, Motiva contends the trial court erred for the following reasons: (1) relief from default was not available under section 473 because default was entered by the trial court, not the clerk; (2) no attorney declaration of fault was submitted with Defendants' initial set-aside motion; (3) Defendants did not serve their court-ordered discovery responses with their motion; (4) Defendants did not explain their delay in filing

their motion to set aside the default; and (5) Defendants are precluded from seeking relief based on the disentitlement doctrine, but the trial court ignored Defendants' disobedience of court orders, and failed to impose certain conditions in granting relief from default. We conclude all these claims lack merit.

Motiva's argument that mandatory relief from default is unavailable because Defendants' default was entered by the trial court, not the clerk, is precluded by the plain language of section 473. The statute's mandatory relief provision applies to any "(1) resulting default entered by the clerk . . . *or* (2) resulting default judgment or dismissal." (§ 473, subd. (b), italics added.) Defendants' default here is covered by the statute's express language. Motiva relies on *Las Vegas Land & Development Co., LLC v. Milkie Way LLC* (2013) 219 Cal.App.4th 1086, which is inapposite. In that case, mandatory relief was unavailable when the plaintiff sought relief from a *summary judgment*, which is not covered by the plain language of section 473 because it is neither a default judgment, nor a dismissal. (*Id*. at p. 1091.) Although not cited in the parties' appellate briefs, the court in *Matera v. McLeod* (2006) 145 Cal.App.4th 44, addressed and rejected the same argument Motiva makes here. (See *id*. at p. 67 ["[T]he mandatory relief provision provides for relief from a default regardless of whether the default was entered by the clerk or the court."].) The *Matera* court ruled that a default judgment entered after terminating discovery sanctions was subject to the mandatory relief provisions of section 473, subdivision (b). (*Matera*, at pp. 62-63, 67.) We agree with the analysis in *Matera*, which is consistent with the plain language of section 473,

subdivision (b), and we reject Motiva's claim that mandatory relief was unavailable here.[8]

Motiva also argues mandatory relief was not available because the declaration from the at-fault attorney was not provided when Defendants initially filed their set-aside motion. An attorney admission of fault is a prerequisite to relief under the mandatory provision of section 473, subdivision (b). (*State Farm Fire & Casualty Co. v. Pietak* (2001) 90 Cal.App.4th 600, 608-609 (*Pietak*).) Here, Defendants met that requirement with Attorney G.'s declaration—where he expressly admitted his mistake which ultimately resulted in the entry of the default judgment. The fact that Attorney G.'s declaration was submitted only on reconsideration is immaterial. The trial court did not consider Attorney G.'s declaration on the issue of fault until after it granted reconsideration, and we already determined the trial court did not abuse its discretion in finding that reconsideration was warranted.

To the extent Motiva asserts that Attorney G.'s declaration was insufficient in failing to address the prospects of settlement and his ability to provide past-due discovery responses, we reject its claim. Motiva misunderstands the requirements for the attorney declaration of fault. The attorney must simply attest to his mistake, inadvertence, surprise, or neglect. "Attestation that one of these reasons existed is sufficient to obtain

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8 The *Matera* case was raised by this court during oral argument. After oral argument, Motiva filed a supplemental letter brief attempting to distinguish *Matera*. Motiva contends the *Matera* court "ignored its own statement of the rule that the 'plain meaning' of a statute controls," and reiterated its position that *Las Vegas Land & Development Co., LLC* applies here. We disagree with Motiva for reasons already stated.

relief, unless the trial court finds that the [default] did not occur because of these reasons." (*Graham*, *supra*, 30 Cal.App.4th at p. 1660.) Here, Attorney G. attested he mistakenly attempted to specially appear, which precluded him from conveying to the trial court that Defendants were attempting to obtain representation but needed additional time. There is sufficient evidence in the record to support the trial court's conclusion that Defendants' default would not have occurred if Attorney G. had made a general, rather than special, appearance. (See *Rodrigues*, *supra*, 127 Cal.App.4th at p. 1033 ["Relief is mandatory when a complying affidavit is filed, even if the attorney's neglect was inexcusable."]; accord, *Pietak*, *supra*, 90 Cal.App.4th at p. 609 [attorney affidavit must include "admission by counsel for the moving party that his error resulted in the entry of a default or dismissal" or a "real concession of error"].) We reject Motiva's claim that the additional facts it cites were statutorily required.

Motiva next argues relief from default was improperly granted because the set-aside motion was unaccompanied by an "answer or other pleading" as required by the statute. (§ 473, subd. (b) ["Application for this relief shall be accompanied by a copy of the answer or other pleading proposed to be filed therein, otherwise the application shall not be granted."].) Motiva does not contend Defendants were required to provide copies of their answers, which previously had been filed and stricken, and which the parties agreed would be deemed to be the operative answers. Rather, Motiva contends that where "the court entered [D]efendants' default because [D]efendants refused to serve court-ordered discovery responses," Defendants were required to serve the past-due

discovery responses along with the set-aside motion or motion for reconsideration.[9] As an initial matter, we note the premise of Motiva's argument—that the court entered the default *because of the failure to serve court-ordered discovery responses*—is flawed. Motiva brought its motion to strike based on Defendants' discovery violations. But the court found that it was counsel's failure to appear—which rendered Motiva's motion to strike unopposed—that precipitated entry of default, not the failure to serve discovery responses. In any event, even if it were applicable here, the statutory attached-pleading requirement is not strictly construed. " 'The plain object of the provision [requiring a copy of the answer or other pleading] was simply to require the delinquent party seeking leave to contest on the merits, to show his good faith and readiness to at once file his answer in the event leave is granted by producing a copy of the proposed answer for the inspection of his adversary and the court.' [Citation.] Because that is the limited purpose for the attached-pleading requirement, 'courts have held substantial compliance to be sufficient.' " (*Austin v. Los Angeles Unified School Dist.* (2016) 244 Cal.App.4th 918, 933.) Here, the record supports the conclusion that Defendants substantially complied by

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9 Motiva relies on *Janetsky v. Avis* (1986) 176 Cal.App.3d 799, 811 which addressed a different issue—a motion for relief from default in failing to timely respond to request for admissions under former section 2033. (See 2033.280, subdivision (c) ["The court shall make this order [deeming requests for admission admitted], unless it finds that the party to whom the requests for admission have been directed has served, before the hearing on the motion, a proposed response to the requests for admission that is in substantial compliance with Section 2033.220."].) Although *Janetsky* is not on point, there is authority for the proposition that "when relief is sought from a terminating sanction imposed for failing to provide discovery responses, the application must be accompanied by verified responses to the discovery in question." (*Rodriguez v. Brill* (2015) 234 Cal.App.4th 715, 729.)

satisfying the trial court's conditions for granting relief, including promptly providing the past-due responses, which demonstrated "good faith and readiness" to act, thus fulfilling the statutory objective of the attached-pleading requirement. (*Ibid*.)

Motiva contends relief from default was not warranted because Defendants offered no explanation for the three-month delay in filing their set-aside motion. Section 473, subdivision (b) requires a party to seek relief "within a reasonable time, in no case exceeding six months." (§ 473, subd. (b).) There is no dispute that Defendants' motion was brought within six months after the default was taken and (upon reconsideration) was accompanied by the required affidavit of fault by Defendants' attorney. Accordingly, the trial court correctly granted mandatory relief under section 473, subdivision (b). Motiva relies on *Huh v. Wang* (2007) 158 Cal.App.4th 1406, 1421-1422, to contend a three-month delay in seeking relief requires an evidentiary explanation. That case is distinguishable because the parties sought discretionary relief from summary judgment, not mandatory relief based on attorney fault as here. (*Younessi v. Woolf* (2016) 244 Cal.App.4th 1137, 1147 ["Unlike the discretionary ground for relief, a motion based on attorney fault need not show diligence in seeking relief. The motion is timely if filed within six months of the entry of the default judgment or dismissal."].)

Finally, we reject Motiva's arguments that relief was unavailable based on the disentitlement doctrine, and that the trial court abused its discretion in failing to impose a bond requirement and failing to require Defendants to pay back taxes allegedly owed. (See *In re Marriage of Shimkus* (2016) 244 Cal.App.4th 1262, 1272 [disentitlement is an equitable doctrine, application of which is reviewed under abuse of discretion standard].)

Motiva cites *Shapiro v. Clark* (2008) 164 Cal.App.4th 1128, 1148, in which the court held the trial court acted within its discretion when imposing a bond requirement as a condition of relief. But there is no requirement that a trial court do so, and we find no abuse of discretion in the trial court's decision not to do so here. The trial court was aware of the history of the case and carefully considered and imposed the conditions it concluded were appropriate under the circumstances. Given the strong policy favoring resolution of actions on their merits (*Rodrigues, supra*, 127 Cal.App.4th at p. 1037), we decline to hold that the trial court abused its discretion based on the way it handled the parties' discovery disputes and its decision not to impose the additional conditions (such as the bond) requested by Motiva. (See *Rush v. White Corp.* (2017) 13 Cal.App.5th 1086, 1098 [a trial court abuses its discretion "only when its ruling ' " 'fall[s] "outside the bounds of reason" ' " ' " or "the trial court's ruling is arbitrary, whimsical, or capricious"].)

DISPOSITION

The order granting, upon reconsideration, Defendants' motion to set aside the default judgments previously entered against them and vacating the previously entered default and default judgments is affirmed. Defendants are entitled to their costs on appeal.

GUERRERO, J.

WE CONCUR:

O'ROURKE, Acting P. J.

AARON, J.